IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-526

GEORGE A. CHITTY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ROBERT M. POSTAL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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George A. Chitty and Robert M. Postal respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered on August 2, 1977 and August 30, 1977, respectively.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendices A and B *infra*) have not been reported. In each case the District Court entered judgment without opinion.

JURISDICTION

The judgments of the Court of Appeals were entered on August 2, 1977 and August 30, 1977 and this petition has been filed within ninety (90) days of each of those dates. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination protects a witness before a federal grand jury from compelled disclosure of information which would incriminate him under the laws of a foreign country where there is a real and objective fear of use of the witness' testimony against him in a foreign criminal proceeding?

2. Whether F.R.Crim.P.6(e) provides protection consonant with the Fifth Amendment against disclosure to foreign law enforcement personnel of self-incriminating testimony compelled before a federal grand jury?

PROVISIONS INVOLVED

The provisions of law involved are the Fifth Amendment to the U.S. Constitution, Title 18 U.S.C. Sections 6002-6003, Title 28 U.S.C. Section 1826 and Rule 6(e) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Petitioners were each adjudicated in civil contempt by the U.S. District Court for the Southern District of Florida pursuant to 28 U.S.C. Section 1826, for declining to give testimony before a federal grand jury after being ordered to do so by the District Court. The contempts arise from the same facts.

On or about September 15, 1976, petitioners were arrested by U.S. Coast Guard personnel on board a vessel of foreign registry after a search of the vessel led to discovery and seizure of 8300 pounds of marihuana. The search of the vessel and resultant arrest of petitioners occurred beyond the twelve mile limit off the Florida coast.

Thereafter petitioners were each charged in the Southern District of Florida with importation, possession with intent to distribute and conspiracy to import and to possess with intent to distribute. The government contended that, when apprehended, petitioners were bringing the marihuana into the U.S. from Colombia, South America. The logs and charts of the vessel on which petitioners were arrested indicated it had recently come from Rio Ocha, Colombia. The defendants (petitioners here) contended they were not on their way toward the U.S. when apprehended and were not attempting to bring the marihuana into the jurisdiction of the U.S.

After the submission of the evidence at their April, 1977 trial, the District Court dismissed the substantive charges. Petitioners were each convicted on the conspiracy count and sentenced to a term of imprisonment. Their appeals from these criminal judgments are presently pending in the Court of Appeals.

Thereafter the Government subpoenaed petitioners before the same grand jury which had indicted them for the purpose of determining who else, if anyone, was involved in the conspiracy to possess the marihuana and import it into the U.S. Chitty duly appeared on May 24, 1977 and answered several questions. He did, however, decline to answer two, one, where did he get the marihuana and, second, where was he taking the load of marihuana. He was thereupon ordered to testify by the District Court pursuant to the provisions of 18 U.S.C. Sections 6002-6003. Chitty nevertheless declined to testify when returned to the grand jury upon the ground that to do so would tend to incriminate him under the criminal laws of Colombia and that the immunity conferred by Sections 6002-6003 did not and could not protect him against use of his grand jury testimony in a criminal prosecution in Colombia.

Relying upon *In re Tierney,* 465 F 2d 806 (5 Cir. 1972), cert.den. 410 U.S. 914 (1973), wherein the Court of Appeals had held that F.R.Crim.P. 6(e) protects against disclosure of grand jury testimony and therefore removes the danger of use in a foreign criminal proceeding of a federal witness' self-incriminating testimony, the District Court held Chitty did not have just cause to refuse to answer and adjudicated him in civil contempt pursuant to 28 U.S.C. Section 1826. The Court of Appeals affirmed this judgment.

Postal duly appeared before the grand jury on July 12, 1977. After answering preliminary questions he declined to answer a question as to how much money he had invested in the marihuana found aboard the vessel. After granted immunity, Postal continued to

decline to respond upon the ground that the immunity did not adequately protect him against the danger he faced of incrimination under Colombian law. The District Court overruled this Fifth Amendment contention and adjudicated Postal in civil contempt. The Court of Appeals affirmed in separate opinion, relying upon its decision in *In re Tierney, supra.*

REASONS FOR GRANTING THE WRIT

The Petition Presents Important and Recurring Constitutional Questions Not Previously Resolved By This Court And Over Which There Exist Conflicts In Lower Federal Court Decisions. The Holding Below Conflicts Squarely With Decisions of the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for Connecticut.

The basic question presented herein is whether the Fifth Amendment privilege protects a witness in the U.S. from self-incrimination under the laws of a foreign jurisdiction. This issue has never been decided by this Court. On separate occasions, however, it has acknowledged its importance. In *Zicarelli* v. *New Jersey State Commission of Investigation,* 401 U.S. 933, 934 (1971), this Court noted probable jurisdiction specifically to consider *inter alia*:

> "4. Whether the immunity statute, N.J.S.A. 52: 9M-17 can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution with respect to an individual who has a real fear of such foreign prosecution?"

On the record there presented, the Court was unable to decide this issue. *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472 (1972).

Earlier this Fifth Amendment question had been presented in the case of a federal grand jury witness. *In re Parker,* 411 F.2d 1067 (10 Cir. 1969). Mootness prevented a decision by this Court on the merits, however, so that it granted certiorari, vacated the judgment of the Tenth Circuit and remanded with instructions to dismiss. *Parker* v. *U.S.,* 397 U.S. 96 (1970).

In *Zicarelli,* this Court held it need not reach the ultimate Fifth Amendment question because, on the facts, Zicarelli had not shown he was "in real danger of being compelled to disclose information that might incriminate him under foreign law." 406 U.S. at 480. Here, however, such danger is posed.

Chitty was asked where petitioners obtained the marihuana and where they were taking it. Postal was asked how much money he had invested in the marihuana. The Government has asserted that, when apprehended with this marihuana in their possession, petitioners were in the process of transporting it from Colombia and in effect had conspired to export it therefrom. The logs and charts of the vessel on which petitioners were arrested and on which the marihuana was found indicated it had recently been in Rio Ocha, Colombia.

Article 37 of Decree 1188 of June 25, 1974, published in the Colombia Diario Oficial of July 8, 1974, provides:

> "Whoever without permission of competent authorities cultivates or maintains plants from which one could extract marihuana, cocaine, morphine, heroin or any other drug or substance which could produce a physical or psychological dependence is punishable by imprisonment of

> from two to eight years plus a fine of 100 to 1,000 pesos."

Article 38 of the Decree provides:

> "Whoever without permission of competent authorities imports, *exports, possesses,* stores, maintains, manufactures, sells, offers, *acquires* or supplies marihuana, cocaine, morphine, heroin or any other drug or substance that produces physical or psychological dependence is punishable by imprisonment for three to twelve years plus a fine of 5,000 to 500,000 pesos." (Emphasis added)

Article 208 of the Colombian Penal Code prohibits conspiracy to commit an illegal act and provides that upon conviction therefor one may be sentenced to a term of imprisonment of from five to fourteen years. Article 211 proscribes "proposing to another the commission of a crime." Such an offense is punishable by sentence of up to three years.

Petitioners could also be prosecuted for a mere attempt to commit a crime under Colombian law. Articles 16 and 17 of the Code provide as follows:

> "*Article 16.* Anyone who for the purpose of committing a crime commences the execution thereof but fails to consummate it for reasons beyond his control shall suffer a punishment not less than one-half of the minimum nor more than two-thirds of the maximum penalty prescribed for the consummated crime.
>
> "*Article 17.* When all acts necessary for the consummation of a crime have been performed, but the actual crime is not accomplished for reasons independent of the volition of the actor, the punishment prescribed for the consummated crime may be reduced to one-third thereof."

Aiding and abetting are similarly illegal and might subject petitioners to criminal prosecution in Colombia:

> "*Article 19.* Anyone who participates in the commission of a deed or has rendered any assistance or cooperation to the offender or offenders, without which it would have been impossible to carry it out, shall be subject to the punishment prescribed for the crime. The same punishment shall be imposed upon any person who has instigated another person to commit it."

In determining the applicability of the privilege against self-incrimination, the questions must be considered in the setting in which they are asked. *Hoffman* v. *U.S.*, 341 U.S. 479, 486-487 (1951). Petitioners were being questioned about their obtaining, possessing and transporting of marihuana on a boat of foreign registry where they had each previously been convicted for conspiracy to possess and and import said marihuana from a foreign jurisdiction, and where the Government asserted and had at least some evidence they had exported the marihuana from Colombia, which makes possession or exportation of marihuana and the related offenses of conspiracy, attempt and aiding and abetting serious crimes punishable by substantial terms of imprisonment.

In these circumstances, petitioners' providing information concerning their possession and transportation of the marihuana in question might well "furnish a link in the chain of evidence needed to prosecute" each petitioner under Colombian law. *Hoffman* v. *U.S.*, *supra* at 486. Such information could "supply investigatory leads to a criminal prosecution" in Colombia. *Albertson* v. *SACB*, 382 U.S. 70, 78 (1965).

There is, therefore, a real danger of self-incrimination under the criminal laws of a foreign country.

The Multilateral Single Convention on Narcotic Drugs, 1961, to which both Colombia and the U.S. are signatories, requires that:

> "The parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."
>
> (Art. 28 *Control of Cannabis* (3))

That international agreement has recently been affirmed and expanded by amendment at a convention in Geneva on March 26, 1972 to which Colombia was a party. By this new amendment the parties pledge to prohibit and strictly penalize all activities related to illicit traffic of narcotics:

> "1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention shall be punishable offenses when committed intentionally, and that serious offenses shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.
>
> 2. Subject to the constitutional limitations of a Party, its legal system and domestic law, (a) (i) Each of the offenses enumerated in Paragraph 1, if committed in different countries, shall be considered as a distinct offense. (ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offenses, and preparatory

acts and financial operations in connection with the offenses referred to in this article, shall be punishable offenses as provided in Paragraph I." (Article 14, Amendments to Article 36, Paragraphs 1 and 2 of the Single Convention)

"Each of the offenses enumerated in Paragraphs 1 and 2(a)(ii) of this article shall be deemed to be included as an extraditable offense in any extradition treaty existing between Parties. Parties undertake to include such offenses as extraditable in every extradition treaty to be concluded between them." (Article 14 (2)(b)(i)) (Emphasis original).

Colombia and the United States had previously entered into a bilateral agreement for Reciprocal Extradition of Criminals signed in Bogota, Colombia, May 7, 1888. A supplementary Convention of Extradition, signed in Bogota, September 7, 1949, added a number of extraditable offenses to the list and specifically included "Crimes against the laws for the suppression of the traffic in narcotics." Article I, No. 22.

In a 1973 House of Representatives Report it was noted the Government of Colombia was beginning to cooperate more fully with the United States in the effort to slow the flow of drugs into this country. The President of Colombia was quoted in a statement made public on January 13, 1973 as agreeing on "the need to coordinate efforts to fight a battle against this serious menace, especially due to its harmful effects on youth." The World Narcotics Problem: The Latin American Perspective, House of Representatives, 93rd Congress, Report No. 13022-4.

Petitioners' counsel was advised by an Assistant Legal Affairs Advisor of the Department of State

that a review of the records of said Department indicates there have been previous extraditions of U.S. citizens to Colombia for criminal prosecution and, further, that a request by Colombia for extradition under existing treaties would be honored by the United States.

Thus, not only is there a substantial danger of self-incrimination of petitioners under clearly defined provisions of Colombian law but a realistic danger of prosecution in Colombia. That country possesses both an articulated concern over reducing the flow of drugs from Colombia to the U.S. and the means, i.e., extradition, to implement that concern in this case by acquiring jurisdiction over petitioners for purposes of criminal prosecution. As the Court of Appeals stated in *Postal*:

"There is no doubt that if allegedly incriminating testimony and evidence was available to the Colombian authorities, charges under Colombian drug laws could be brought against Postal and extradition requested." (Footnote omitted)

The danger of use of petitioners' grand jury testimony in a Colombian prosecution is particularly acute because it is the policy of the Drug Enforcement Administration to furnish evidence obtained by U.S. authorities in drug cases to authorities in other countries. John T. Cusack, Chief of the International Operations Division of the D.E.A., quoted in the Spring, 1976 issue of the D.E.A. magazine, "Drug Enforcement," stated:

"A new technique involving simultaneous prosecutions in Mexico and the United States of major violators was inaugurated in 1975. This program

> follows the concept developed with the French authorities over a period of years whereby suppliers in France were prosecuted *on the basis of evidence and testimony developed against them in the United States. . . .*" (at page 34) (Emphasis added)

The Government contends, however, that F.R.Crim. P. 6(c) provides a sufficient guarantee against use of petitioners' self-incriminating testimony in a Colombian prosecution. Relying upon the Fifth Circuit's decision in *In re Tierney,* 465 F.2d 806 (5 Cir. 1972), cert.den. 410 U.S. 914 (1973), the District Court accepted this contention and the Court of Appeals affirmed.

In *Tierney,* the Court stated:

> "[B]ecause of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), F.R.Crim.P., provides for this secrecy. The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of allowing it to disclose matters in the performance of its duties, without a court order. This is answer enough to the contention of appellants that the government might disclose their testimony." 465 F.2d at 811 (footnote omitted).

Tierney holds in effect that under no circumstances may a witness before a federal grand jury decline to testify on the ground his answers might tend to incriminate him under foreign law; that Rule 6(e) standing alone establishes a guarantee against use of the grand jury testimony in a foreign prosecution

that satisfies the Fifth Amendment. See also *In re Parker,* 411 F.2d 1067, 1069-70 (10 Cir. 1969), vacated and remanded 397 U.S. 96 (1970).

This holding conflicts with opinions issued by the U.S. District Court in Connecticut and the U.S. Court of Appeals for the Ninth Circuit, as well as the view expressed by Mr. Justice Douglas.

In *In re Cardassi,* 351 F.Supp. 1080, 1082-3 (D. Conn. 1972), District Judge Jon O. Newman, in a thoughtful and comprehensive opinion, specifically considered and rejected the secrecy rationale of *Tierney* and *Parker*:

> "With deference, this Court declines to follow the two courts of appeals which have found this argument persuasive. . . .The argument rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the disclosure requirements of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceeding would not honor the rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness' answers known to foreign prosecuting officials, it is unlikely that he would apply to this Court for disclosure of the grand jury minutes. He would simply send the transcript. It may well be that such conduct would render the official subject to the disciplinary powers of this Court if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness." *Id.* at 1082.

The Court relied upon the observation in *Kastigar* v. *U.S.* 406 U.S. 441, 460 (1972) that a federal grand jury witness compelled to reveal self-incriminating information "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities," a fact relied upon by this Court in upholding the constitutionality of the use immunity statute. Judge Newman noted that such good faith "is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial ban on use and derivative use of compelled testimony is unenforceable." *Id.* at 1083.

In *Vandeyacht* v. *U.S.*, No. 75-3290 (9 Cir. Nov. 24, 1975), decided after *Tierney* and *Parker*, the Court of Appeals reversed an order adjudging a witness in civil contempt for refusal to testify before a federal grand jury and remanded for further proceedings. In particular, in response to the witness' claim of fear of self-incrimination under Mexican law, the Court of Appeals directed the trial court to make findings of fact and conclusions of law relating to the question, among others: "What assurances and methods of supporting them can the government or the court, or both, provide that . . . Vandeyacht's answers to the grand jury questions will not be disclosed to Mexican authorities?" The Court thus implicitly rejected the government's contention that Rule 6(e) by itself provides constitutionally adequate assurance against such use.

In dissenting from the denial of certiorari in *Tierney* v. *U.S.*, 410 U.S. 914, 916, n.2 (1973), Justice Douglas recognized the many circumstances in which

compelled self-incriminating testimony before a grand jury may *lawfully* be disclosed. Notwithstanding a grant of immunity pursuant to Title 18 U.S.C. Section 6002-6003, a witness may constitutionally be prosecuted for perjury before the grand jury. The Fifth Circuit in *Tierney* termed this "a speculative hypothesis," 465 F.2d at 812, but the law has been settled on this point since *Glickstein* v. *U.S.*, 222 U.S. 139 (1911). Such a defendant would have the right to a public trial of the perjury charge, *In re Oliver*, 333 U.S. 257 (1948), but exercise of this constitutional guarantee would lead to public disclosure of his testimony incriminating him under Colombian law.

Grand jury testimony will also be and is often disclosed pursuant to the constitutional mandate of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny or pursuant to the Jencks Act, Title 18 U.S.C. Section 3500. These disclosures are not discretionary but are mandated by law.[1]

A witness' supposedly immunized testimony may also be used in certain circumstances on cross-examination to impeach the direct testimony of the grand jury witness at his own criminal trial. Cf. *U.S.* v. *Moss*, No. 77-1134 (2 Cir., Sept. 6, 1977). Indeed, in *Moss*, the Government has taken the position that *Harris* v. *New York*, 401 U.S. 222 (1971) and *Walder*

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[1] As Justice Douglas has noted, these disclosures are also frequently effected without court order. 410 U.S. at 916, n.2. Indeed the government's representation relied upon in *Tierney* to the effect that it cannot and does not make *any* disclosure of grand jury testimony without prior court order is contradicted by law and fact. E.g., *U.S.* v. *Hoffa*, 349 F.2d 20,43 (6 Cir. 1965), aff'd 385 U.S. 397 (1966); *U.S.* v. *Culver*, 224 F.Supp. 419, 432 (D.Md. 1963); *U.S. V. Anzelmo*, 319 F.Supp. 1106, 1116 (E.D.La. 1970).

v. *U.S.*, 347 U.S. 62 (1954) "sanction a general use of immunized testimony for purposes of impeachment," that is, that even truthful statements may be used for impeachment.

The opinions of the District Court of Connecticut in *Cardassi*, the Ninth Circuit in *Vandeyacht* and Justice Douglas in *Tierney* each conflict with the holding below and suggest persuasive reasons why the Fifth Circuit ruling is unfounded.

It should be recognized that in practice Rule 6(e) has failed to provide meaningful protection against public disclosure of grand jury testimony. In the recent period, there have been numerous leaks of testimony before federal grand juries, many of which have been well publicized and need no recounting here. The incidence of grand jury leaks and the necessary conclusion relative to the effectiveness of Rule 6(e) is well summarized in a Report by several committees of the prestigious Association of the Bar of the City of New York:

> "In numerous recent instances involving public figures and criminal activity of a newsworthy kind, disclosures attributed to 'sources close to the investigation' have appeared in the public media. These stories have included predictions as to who would be indicated and when, who was 'under investigation' *and what witnesses were saying.*
>
> * * *
>
> The types of proceedings thus publicized have included *grand jury investigations, the actual text of grand jury minutes as well as the thrust of grand jury testimony.* . . . These situations have arisen on all three levels of government, federal, state and local.
>
> * * *

> Violations of Rule 6(e) may be punished as contempt of court. . . . The power to punish by contempt appears to be rarely invoked to punish unauthorized disclosures, *and the number of prejudicial leaks which have occurred during the last year demonstrates that the contempt power is not an effective deterrent."* (Emphasis added)

"Strengthening the Role of the Federal Grand Jury: Analysis and Recommendations," reprinted in Federal Grand Jury, Hearings Before the Subcommittee on the Judiciary, House of Representatives, 95th Congress, 2d Session on H.J.Res. 46, H.R. 1277 and Related Bills, pp. 621, 628-634.

In a letter to Hon. Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary, dated July 23, 1975, an Assistant Attorney General, expressing the views of the Department of Justice, stated:

> "The incidence of breaches of grand jury secrecy has been such, we believe, as to warrant the enactment of criminal provisions (supplementary to the contempt powers of the court) to protect grand jury secrecy. . . ."

See Federal Grand Jury, *supra*, pp. 77, 79.

The inadequacy of Rule 6(e) as a protection against disclosure of grand jury testimony has likewise been acknowledged by the Ad Hoc Committee on Grand Juries of the Advisory Committee on Criminal Rules of the U.S. Judicial Conference:

> "It is recommended that unauthorized disclosure of matters occurring before the grand jury be made a criminal offense. This recommendation results from two considerations. One is that unauthorized disclosure is becoming a more serious

> problem, particularly with regard to grand jury inquiries focusing upon public figures. . . . The second consideration is that the limited reach of Rule 6(e) and the contempt power is not adequate to deal effectively with unauthorized disclosure."

See "Operation of the Grand Jury—A Study Conducted by the Advisory Committe on Criminal Rules" in Federal Grand Jury, *supra,* pp. 226, 241.

It should also be noted that Rule 6(e) has only recently been amended to permit even broader disclosure. On August 1, 1977 an amendment to the Rule became effective which defines "attorneys for the government," as that term is used in Rule 6(e) specifying those to whom disclosure may be made, to include not only those identified in F.R.Crim.P. 54(c) (as previously), but also "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." 44 USLW 4549. Persons who are not attorneys and not officers of the Court will now be entitled to see the contents of grand jury testimony.

There is also a conflict among the lower federal courts on the ultimate constitutional question whether the Fifth Amendment privilege protects a federal grand jury witness against self-incrimination under the laws of a foreign country. In *In re Cardassi,* 351 F.Supp. 1080, 1084-1086 (D.Conn. 1972), the Court held the Fifth Amendment does afford this protection:

> "(T)he Amendment must be reckoned with when a person in an American court claims that his testimony is being judicially compelled here and

> may well be used in a foreign court. In this situation, the issue is not the availability of the privilege but its proper scope, i.e., whether the reasonably feared prospect of foreign use of testimony can be a basis for resisting its compulsion by an American court. Since *Murphy* construed the privilege to have the same scope under our Constitution as it has in England, where it can be claimed to preclude foreign use of compelled testimony, the privilege can be claimed in this case at the point when the testimony is sought to be judicially compelled." 351 F. Supp. at 1086 (footnote omitted).

Compare *In re Parker,* 411 F.2d 1067, 1070 (10 Cir. 1969), certiorari granted and judgment vacated 397 U.S. 96 (1970), where the Court of Appeals stated the Fifth Amendment "need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation."

This is an important issue; the conflict in lower court opinions underscores the importance of its final resolution by this Court.

In *Murphy* v. *Waterfront Commissioner,* 378 U.S. 52 (1964) this Court held the Fifth Amendment privilege protects a witness in one U.S. jurisdiction from self-incrimination under the laws of another jurisdiction in the U.S. Significantly the *Murphy* Court relied upon and quoted approvingly from the leading English case of *U.S.* v. *McRae,* L.R. 3 Ch. App. 79 (1867).

In *McRae,* the U.S. sued in an English court for an accounting and payment of moneys allegedly received by the defendant as an agent for the Confederacy during the Civil War. When the defendant declined to answer discovery questions for fear of in-

crimination under foreign (U.S.) law, the U.S. moved to compel responses. The Court of Chancery denied the application, holding that where there exists a real danger of prosecution in a foreign jurisdiction, the case could not be distinguished "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." 378 U.S. at 63 (quoting *U.S.* v. *McRae, supra* at 87).

This Court then stated:

> "In light of the histories, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts. . . ." 378 U.S. at 77.

Thus *Murphy,* while it does not decide the precise point, supports the conclusion that the Fifth Amendment protects a witness against self-incrimination under the criminal laws of a foreign jurisdiction.

Cases in which a federal witness invokes the Fifth Amendment privilege on the ground his testimony may tend to incriminate him under foreign law are recurrent. In addition to *Cardassi, Vandeyacht, Tierney* and *Parker, supra,* see also *In re Quinn,* 525 F.2d 222 (1 Cir. 1975) and *In re Cahalane,* 361 F.Supp. 226 (E.D.Pa. 1973) (grand jury witnesses); cf. *U.S.* v. *Vanagita,* 552 F.2d 940 (2 Cir. 1977) (trial witness). The responses of the lower courts to this Fifth Amendment contention have been varied. A decision by this Court would achieve uniformity in approach as well as resolve the conflicts which exist in lower court holdings.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Aug. 30, 1977.

No. 77-2468

Summary Calendar.*

In re GRAND JURY PROCEEDINGS.

UNITED STATES OF AMERICA, *Appellee*,

v.

Robert Morris POSTAL, *Appellant*.

• • •

Appeal from the United States District Court for the Southern District of Florida.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Appellant, Robert Postal, appeals from an adjudication of civil contempt for failure to testify before a federal grand jury after having been given use immunity under 18 U.S.C. §§ 6002, 6003.[1] Appellant was incarcerated and was

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1] § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not

denied bail pending appeal under 28 U.S.C. § 1826(a) and (b).[2]

There are four assignments of error. The principal assignment is that use immunity was insufficient to displace

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refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

[2] § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, docu-

appellants' Fifth Amendment rights because of the possibility of prosecution in Colombia, South America. The other three assignments are (1) the trial court erred in denying appellant's motion to quash the grand jury subpoena in that the questions to be propounded to the witness were a result of a seizure effected beyond the jurisdiction of the Coast Guard, (2) the trial court erred in refusing to grant appellant adequate notice and time to prepare for the contempt hearing and (3) the trial judge erred in not recusing himself pursuant to appellant's affidavit of bias. We affirm.

On July 12, 1977, defendant appeared, pursuant to subpoena, before the Grand Jury in the Fort Lauderdale Division of the Southern District of Florida. The Grand Jury was conducting an investigation into the circumstances surrounding the possession, transportation and importation of 8,300 pounds of marijuana seized by the United States Coast Guard after search of a foreign vessel, the LA ROSA, registered in the Cayman Islands. Appellant and two others were aboard the vessel.

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ment, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

This same Grand Jury had previously indicted all three for importation of marijuana, possession with intent to distribute, and conspiracy to commit the substantive offenses. After a trial before Judge C. Clyde Atkins,[3] the substantive charges were dismissed and they were all convicted of the conspiracy count. Appeals are pending in this court.

On July 11 and 12, 1977, appellant filed with the District Court various motions and memoranda concerning all issues and defenses which would be raised in the event of a subsequent contempt hearing. A motion for continuance was filed on July 12, 1977, in which appellant gave notice of his intention to invoke the Fifth Amendment and refuse to testify even with a grant of use immunity.

Appellant appeared before the Grand Jury that same day represented by counsel and refused to answer one question, in particular, "How much money did you have invested in the marijuana aboard the LA ROZA, seized by the Coast Guard?"

At a 4:00 P.M. hearing that afternoon, appellant was granted use immunity upon motion of the Government. Appellant returned to the Grand Jury room and again refused to testify.

An hour later the Government commenced a civil contempt hearing before Judge Norman Roettger over appellant's objection that he had not been given adequate prior notice and opportunity to prepare for the hearing. Judge Roettger overruled this objection stating that he found "[t]here was no surprise."

The Supreme Court has not reached the constitutional ". . . claim that a grant of immunity cannot supplant the Fifth Amendment privilege with respect to an individual

[3] The trial and conviction occurred before Postal ever received the grand jury subpoena.

who has a real and substantial fear of foreign prosecution." *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972). The decision in *Zicarelli* did note that ". . . the [Fifth Amendment] privilege protects against real dangers, not remote and speculative possibilities." [Footnote omitted]. *Supra*, p. 478, 92 S.Ct. p. 1675.

Appellant asserts several factors which expose him to a "real danger" of foreign prosecution. First he submits that answering questions asked before the Grand Jury would tend to incriminate him under Colombian law. Second, he urges that there is a reasonable fear of prosecution under Colombian law and that, third, this testimony might be used against him in such a prosecution. Last he asserts the Fifth Amendment privilege protects him from testifying.

There is no doubt that if allegedly incriminating testimony and evidence was available to the Colombian authorities, charges under Colombian drug laws could be brought against Postal and extradition requested.[4] However, the

[4] Appellant cites numerous provisions of Colombian law which might provide the basis for a criminal prosecution of Appellant. Article 37 of Decree 1188 of June 25, 1974 (published in The Diario Official of July 8, 1974) prohibits cultivation and maintenance of plants from which one could extract marijuana without permission of competent authority. Violation is punishable by imprisonment of from two to eight (2-8) years, plus a fine from 100 to 10,000 pesos. Article 38 proscribes the import, *export*, storage, maintenance, *possession*, manufacture, sale, offer, *acquisition*, or supply of marijuana without permission of competent authority. Such activity is punishable by imprisonment of from three to twelve (3-12) years, plus a fine of 5,000 to 50,000 pesos.

Further, Article 208 of the Colombia Penal Code makes conspiracy to commit the above offenses punishable by five to fourteen (5-14) years imprisonment. Proposing to another the commission of a crime is punishable under Article 211 by imprisonment up to three (3) years.

key words above are "if . . . available". This Circuit held in *In Re Tierney,* 465 F.2d 806 (5th Cir. 1972), that:

> . . . because of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), F.R.Crim.P., provides for the secrecy. The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of allowing it to disclose matters in the performance of its duties, without a court order. This is answer enough to the contention of appellants that the government might disclose their testimony. [Footnote omitted].

In Re Tierney, supra, p. 811. Thus, in this case, we find there is no real danger of foreign prosecution.

The motion to quash based on a seizure which was effected allegedly beyond the jurisdiction of the Coast Guard is without merit.[5] Appellant attempts to draw a distinction from the Supreme Court case which provides that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. *United States* v. *Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

> [The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result

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Articles 16, 17 and 19 of the Code make attempting the commission of a crime or aiding or abetting the commission thereof a criminal offense, each one punishable by a term of imprisonment for several years.

[5] This issue of whether there was an illegal seizure is presently awaiting decision by the Fifth Circuit.

> of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. [Citation omitted]

Calandra, supra, p. 343, 94 S.Ct. p. 617.

Whether appellant's claim is one of illegal search and seizure or the proper jurisdiction of the Coast Guard (which we decline to decide here), *Calandra* controls. The motion to quash was properly denied.

Appellant next suggests that he was not given adequate notice and time to prepare for the contempt hearing citing *Harris* v. *United States,* 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed. 2d 240 (1965). In this case, appellant had adequate time to prepare for the contempt hearing. The defendant was subpoenaed more than a month prior to his scheduled Grand Jury appearance. On that scheduled date, July 12, 1977, appellant's counsel filed numerous motions, which included a memorandum of law in which the above issues were exhaustively briefed. Appellant's motion for continuance states in part:

> The witnesses intend to invoke their Fifth Amendment rights before the Grand Jury. If granted immunity, they still intend to invoke their Fifth Amendment rights. Undoubtedly, the Government will seek to have the witnesses held in contempt. The defenses that the witnesses will raise are set forth in their simultaneously filed motion to quash. (R. 81)

The realities of this situation indicate appellant knew exactly what was going to happen and was prepared to raise all applicable issues and defenses. Appellant's suggestion that in this case Judge Roettger should have set a hearing for another date is without merit.

Appellant's motion to recuse Judge Roettger is insufficient in that the alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and that

prejudice and bias must result in an opinion on the merits on some basis other than what the Judge was exposed to in his participation in this case. *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5th Cir. 1975) *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188.

On the basis of the foregoing, we affirm the judgment of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2109
Summary Calendar *

In re: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

GEORGE A. CHITTY, *Defendant-Appellant.*

Appeal from the United States District Court
for the Southern District of Florida

(AUGUST 2, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.
MORGAN, Circuit Judge:

Appellant Chitty is incarcerated under an adjudication of civil contempt for failure to testify before a federal grand jury after having been afforded immunity under 18 U.S.C.A. § 6001, *et seq.* The incarceration is pursuant to 28 U.S.C.A. § 1826. The appeal is subject to the 30-day statutory requirement of 28 U.S.C. § 1826(b). The record and briefs were filed on short notice in order to comply with the statute. For reasons stated in our orders of June 6, 1977, and July 13, 1977, we extended the expiration time of the 30-day period to August 8, 1977.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409 Part I.

There are four assignments of error alleged by appellant, and they are as follows:

I The trial court erred in refusing to grant the defendant adequate notice and time to prepare for the contempt hearing.

II The trial court was biased and prejudiced against the defendant and his attorney because of the conduct of other attorneys who had represented witnesses previously subpoenaed before the same grand jury and because of the attorney's foreign bar membership; this obvious attitude of the trial court denied the defendant his right to due process of law.

III The trial court erred in holding that the government made an adequate denial of illegal electronic surveillance and wire-tapping, when the testimony of the Assistant United States Attorney and of the case agent established that no steps whatsoever had been taken to determine whether or not there had been any such electronic surveillance or wiretapping.

IV The grant of use immunity to the defendant was insufficient to displace his Fifth Amendment right against self-incrimination, because if the defendant answered the questions which were asked, and which were to be asked, there was a real and substantial probability that his answers would result in a foreign prosecution.

The facts of the record disclose that appellant Chitty and two others were subpoenaed to appear before the grand jury, Fort Lauderdale Division, Southern District of Florida, on May 23, 1977. This grand jury had previously indicted them for various marijuana-related offenses, and they were tried in the latter part of April,

1977, before Honorable Clyde C. Atkins, United States District Judge for the Southern District of Florida. Judge Atkins found them guilty on two conspiracy charges and dismissed the two substantive charges. That case is on appeal to this court.

The appellant's attorney, Mr. Eugene Hines, had been chief counsel for Chitty and two co-defendants in the trial before Judge Atkins.

Appellant Chitty had been served with a grand jury subpoena on April 22, 1977, immediately after his conviction in the non-jury trial and more than a month prior to his scheduled grand jury appearance. Chitty's attorney, Mr. Hines, believed that the grand jury appearance would be continued, but more than two weeks prior to the May 24, 1977, grand jury appearance, Assistant United States Attorney Michael P. Sullivan advised appellant's co-counsel that the grand jury appearance would not be continued.

On May 24, 1977, as scheduled, Chitty and two other witnesses appeared at the federal court house in Fort Lauderdale, Florida. They were represented by Attorney Hines. From approximately 10:30 A.M. until 11:30 A.M., on May 24, 1977, the three witnesses were given a hearing before District Judge Norman C. Roettger, Jr. on their motion for continuance. Attorney Hines explained to the court that he felt unprepared to go forward as the witnesses' attorney, though he had been looking into the matter for several days.[1] The hearing was continued until 1:30 P.M., when Judge Roettger denied any further continuance. At that time, Attorney Hines served upon the court and government a motion for discovery of electronic surveillance pursuant to 18 U.S.C. § 3504, and 18 U.S.C. § 2515, with an accompanying memorandum of law.

Appellant's counsel supported his claim of electronic surveillance by alleging that the government had in its

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[1] Transcript, Volume II, Page 1.

possession evidence which it could not have come by had there not been some electronic surveillance. Counsel claimed that the government had acquired the names of various individuals who were later subpoenaed before the grand jury by intercepting appellant's telephone calls. Assistant United States Attorney Sullivan denied there had been any electronic surveillance.

Appellant Chitty and his former co-defendant, Robert Postal, then testified in support of the motion to compel disclosure of electronic surveillance, claiming that they had experienced telephone difficulties during the course of the government's investigation.

Special Agent Richard Waldie, of the Drug Enforcement Administration, testified on behalf of the government that he was the only case agent on this particular investigation, and that he was not aware of any electronic surveillance. Waldie testified that the evidence in question was obtained as the result of the seizure of certain papers along with the vessel "La Rosa" which bore the names of various individuals. Other information was secured by administrative subpoena of telephone records. On cross examination, Waldie testified that he did not contact numerous agencies, including the United States Postal Service, Internal Revenue Service, Secret Service, Federal Bureau of Investigation and Central Intelligence Agency, because they were not involved in the investigation and had no connection with the case. Waldie further testified that had there been any wire-tap conducted by such agencies, as case agent he would have been contacted.

Assistant United States Attorney Sullivan then testified that absolutely none of the information which he possessed could have come from electronic surveillance, and that the names of several individuals were obtained from subpoenaed telephone records. Mr. Sullivan testified that the "A" agency check requested by appellant would have entailed a very complicated procedure costing approxi-

mately $50,000. Sullivan then testified that he had always been the Assistant United States Attorney assigned to the case, he knew the source of every bit of information (none of which was obtained illegally), and that based on his experience it would have been impossible for him not to know of the existence of any wire-tap.

The district court found the substance of appellant's motion to disclose electronic surveillance to be frivolous and totally lacking in evidential support.

The court next heard argument that the grand jury was without jurisdiction to compel appellant's appearance, on the ground that there had been no jurisdiction originally to arrest and try him. After a brief discussion concerning the sufficiency of immunity, should it be granted later, the court adjourned.

Appellant Chitty then appeared before the grand jury and on two occasions consulted with his attorney, Mr. Hines, concerning questions propounded by the grand jury. After both consultations the appellant asserted his privilege against self-incrimination. All parties then returned to the district court where Chitty was granted "use immunity" pursuant to 18 U.S.C. § 6001, *et seq*, upon motion of the government.

At this time, another hearing was held at which defense counsel argued that the immunity grant was insufficient; that the grant would fail to protect Appellant from foreign prosecution and would prejudice any appeal, as the immunized answers could be used against appellant for impeachment or in a perjury prosecution if he should take the stand in a retrial. These motions were denied.

Chitty returned to the grand jury and refused to testify despite the grant of immunity, claiming that to do so would prejudice his right to appeal. Thereafter, at approximately 5:00 P.M., Tuesday, May 24, 1977, a contempt hearing was held in which Judge Roettger denied appel-

lant's counsel's request for continuance. Appellant's counsel failed to raise the issue of foreign prosecution but, instead, asserted that the testimony before the grand jury would prejudice Chitty's right to appeal. After hearing argument and a statement by Chitty, the court found Chitty's refusal to be without just cause and held him in contempt of court, pursuant to 28 U.S.C. § 826(a). The court denied bail pending appeal, pursuant to 28 U.S.C. § 1826(b), finding that the proceedings before the court and any appeal would be frivolous and taken for delay.

The first assertion of error is that the trial court erred in refusing to grant the appellant adequate notice to prepare for the contempt hearing. The record, however, shows that appellant's attorney, Mr. Hines, had more than adequate time to prepare for his representation of Chitty before the grand jury. Mr. Hines had been chief counsel for Chitty and his two co-defendants in the trial before Judge Atkins. Chitty had been subpoenaed at least a month before his scheduled grand jury appearance and was advised two weeks prior to the scheduled grant jury appearance that it would not be continued. On May 24, 1977, Mr. Hines disclosed to the district court that though he felt unprepared, he had been in fact looking into the legal issues on behalf of his client for some days previous. Hines was able to file with the court a motion and memorandum of law compelling discovery of electronic surveillance, and was granted a full evidentiary hearing on this issue. Appellant cites *Harris vs. United States,* 382 U.S. 162 (1965), to support the proposition that the district court failed to grant adequate notice and hearing to prepare for the contempt hearing. The situation in *Harris* is inapposite to the case at hand. The contempt hearing in *Harris* was a true summary procedure in which the defendant was deprived of a reasonable time to prepare and argue all relevant issues. Subsequent decisions have made it clear that the determination of a reasonable time to prepare for a contempt hearing is committed to

the sound discretion of the trial court (within the limits of *Harris, supra*), and that the amount of time may vary according to the existing circumstances. *United States vs. Alter,* 482 F.2d 1016 (9th Cir. 1973). In *Alter,* the court stated in some cases all of the important issues have been raised by the time of the immunity hearing and it will be apparent that the actual contempt hearing can raise no new issues. If so, the witness may have had adequate time to prepare even though very little time elapses between the alleged contempt and contempt hearing. 482 F.2d at 1024.

In this case, all of the relevant defense issues had actually been raised and argued prior to the contempt hearing, and it was apparent that the actual contempt hearing would raise no new issues.

In the instant case, Chitty had been subpoenaed for more than a month before his scheduled grand jury appearance. Undoubtedly Chitty and his counsel realized that he would have to answer or face contempt. To say that appellant was not afforded an adequate opportunity to prepare is to ignore the realities of the situation.

As was held in *Weinberg vs. United States,* 439 F.2d 743, 746 (9th Cir. 1971), an analagous situation, the court held there was no denial of due process, stating:

> Each appellant and attorney had ample notice that contempt proceedings would be held in the event of refusal to answer the questions, and ample notice of the issues which would be relevant thereto.

We hold that Chitty had a reasonable time to prepare for the contempt hearing and that said hearing was adequate.

Appellant's second assertion of error is that the district court was biased and prejudiced against him and his attorney because of the conduct of other attorneys

who had represented witnesses previously subpoenaed before the same grand jury and because of the attorney's foreign bar membership, and that this obvious attitude of the district court denied Critty due process of law.

We have carefully examined the record and although the district court's conduct throughout the hearing might not have been a model of judicial conduct, some of the court's comments reprimanding appellant's counsel were in some instances justified by the dilatory tactics employed by counsel. In spite of the assertions of Mr. Hines, the district court nonetheless allowed an entire court day for argument on the issues relevant to the hearing.

We find no merit in appellant's contention that he was deprived of due process and an impartial hearing.

In his third contention of error, appellant alleges that the government's response to the motion for discovery of electronic surveillance was insufficient as it did not amount to a full central records check of numerous federal agencies. Appellant's motion, pursuant to Title 18, § 2515, as found by the district court, was unsupported by articulable facts and was based solely on speculation. The government counsel made an unsworn oral denial of illegal surveillance. The sole Drug Enforcement Administration agent involved in the case denied electronic surveillance. As was noted in *Beverly vs. United States,* 468 F.2d 732 (5th Cir. 1972), district courts must balance the right of witnesses to be free from unwarranted surveillance with the right of the government to operate grand juries in an effective manner; such courts must be given "wide latitude" in evaluating such claims of unlawful surveillance.

We conclude that the district court did not abuse its discretion in determining that the government's general denial, when viewed in the context of Chitty's general and unsubstantiated assertions, satisfied 18 U.S.C. § 3504. *See also, United States vs. Stevens,* 510 F.2d 1101 (5th Cir. 1975).

The fourth and last assertion of error is that the grant of use immunity to Chitty was insufficient to protect his Fifth Amendment right against self-incrimination, as there was a real and substantial probability that his answers would result in foreign prosecution. Appellant cites the case of *Zicarelli vs. New Jersey Commission of Investigation,* 406 U.S. 472 (1972), and *Murphy vs. Waterfront Commission,* 378 U.S. 52 (1964), to support his position that immunity must be coextensive with foreign prosecution and that the Fifth Amendment protects from foreign prosecutions. We do not find this position to be supported by these cases. Neither did we hold in the case of *In Re Field,* 532 F.2nd 404 (5th Cir. 1975), *cert. den.* 532 U.S. 404, also cited by appellant in support of this position, that the Fifth Amendment extended to protect from foreign prosecution. In fact, in *Field,* we clearly stated that we did not pass on the issue of whether the Fifth Amendment extended to protect from foreign prosecution.

Again, a careful review of the record indicates that appellant has failed to show any real or substantial likelihood that he faces foreign prosecution in Colombia, or that any answers which he might give before the grand jury would be used in any foreign prosecution. The Fifth Amendment protects against real danger, not remote and speculative possibilities. *Zicarelli, supra.*

The complaint against the district court is without merit Order and judgment

AFFIRMED.

APPENDIX C

Statutes, Rule and Guidelines Involved

28 U.S.C. § 1826. Recalcitrant Witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

18 U.S.C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsction (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in sestion 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

F.R.Crim.P. 6(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes these enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The federal magistrate to whom an indictment is returned may direct that an indictment shall be kept secret until the defendant is in custody or has been released pending the trial. Thereupon the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

No. 77-526

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE A. CHITTY, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT M. POSTAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-526

GEORGE A. CHITTY, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT M. POSTAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in Postal's case (Pet. App. 1a-8a) is reported at 559 F. 2d 234. The opinion of the court of appeals in Chitty's case (Pet. App. 9a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals in Chitty's case was entered on August 2, 1977. The judgment of the court of appeals in Postal's case was entered on August 30,

1977. The petition for writs of certiorari was filed on October 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, grand jury witnesses who have been given use immunity, may refuse to testify because of their assertion that the testimony may incriminate them under the laws of Colombia.

STATEMENT

On April 22, 1977, petitioners were subpoenaed to testify before a federal grand jury sitting in the Southern District of Florida. The grand jury was investigating the possession, transportation and importation of 8,300 pounds of marijuana, which had been seized by the United States Coast Guard from a vessel in offshore waters. The seizure had led to the prosecution and conviction of petitioners for conspiracy to import marijuana; the grand jury wanted to pursue further leads and to investigate the possible involvement of other persons in the venture.[1]

On May 24, 1977, petitioner Chitty appeared before the grand jury. After acknowledging both that he and petitioner Postal were aboard the vessel at the time of the search and that he knew that there were "some 7,000 or so pounds of marijuana aboard the vessel," Chitty invoked

[1]The grand jury that subpoenaed petitioners had previously indicted petitioners and Salem Forsythe for importation of marijuana, possession with intent to distribute, and conspiracy to commit these offenses. In a non-jury trial in April 1977, petitioners and Forsythe were found guilty of the two conspiracy charges, and the court dismissed the substantive offenses. Appeals from these convictions are pending in the court of appeals (Pet. App. 4a).

his privilege against self-incrimination and refused to answer two other questions: "Where had you gotten that * * * marijuana" and "Where were you taking that load of marijuana" (May 24, 1977, G.J. Tr. 2-4).[2] Chitty was given use immunity pursuant to 18 U.S.C. 6002 and ordered by the district court to testify (Pet. App. 13a). When Chitty again refused to answer the two questions, he was held in civil contempt pursuant to 28 U.S.C. 1826(a) and was ordered confined until he purged himself (Pet. App. 14a).

Petitioner Postal appeared before the grand jury on July 12, 1977. He also invoked his privilege against self-incrimination and refused to answer the question "how much did you have invested in the marijuana found aboard [the seized vessel]" (July 12, 1977, G.J. Tr. 3). Postal was granted use immunity; when he continued to refuse to answer the question, he was held in civil contempt and ordered confined.

The court of appeals affirmed in both cases. It concluded that the compelled testimony would not create any reasonable danger of prosecution of petitioners by Colombia, and it therefore did not decide whether the existence of such a danger would have been a sufficient excuse not to answer.[3]

[2]At petitioners' trial the prosecution "contended that, when apprehended, petitioners were bringing the marihuana into the [United States] from Colombia, South America. The logs and charts of the vessel * * * indicated it had recently come from Rio Ocha, Colombia, [but petitioners] contended they were not on their way toward the [United States] * * * and were not attempting to bring the marihuana into [this country]" (Pet. 3).

[3]The grand jury's term expired on January 6, 1978, and petitioners were released. But the United States Attorney intends to request another grand jury in the near future to question petitioners. Accordingly, we do not suggest that this case is moot.

ARGUMENT

Petitioners argue that a witness can refuse to testify, despite receiving use immunity, when the testimony may be used against him in a subsequent foreign prosecution. This is an important problem, which this Court must eventually address. But here, as in *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, there is no need to do so. "[T]he privilege protects against real dangers, not remote and speculative possibilities" (*id.* at 478), and petitioners were "never in real danger of being compelled to disclose information that might incriminate [them] under foreign law" (*id.* at 480).

1. The May 7, 1888, treaty for the "Reciprocal Extradition of Criminals, Between the United States of America, and the Republic of Colombia," provides in Article X: "Neither of the high contracting parties shall be bound to deliver up its own citizens, under the stipulations of this Convention." 26 Stat. 1534, 1538. Both petitioners are citizens of the United States.[4] In *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, this Court concluded that an identical provision in an extradition treaty between the United States and France barred extradition of United States citizens to France. The Court explained (*id.* at 9):

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

[4]Petitioner Chitty was born in Paris Island, South Carolina, and petitioner Postal was born in Columbia, South Carolina.

Valentine holds that petitioners cannot be extradited to Colombia pursuant to the present treaty, even if the Executive Branch should believe that extradition is in the best interests of the United States.[5] This circumstance disposes of petitioners' assertion that there is a real danger that their testimony could be used against them in Colombia.[6]

2. In any event, petitioners were not asked to give public testimony. Grand jury proceedings are secret, and, if petitioners testify, there would be no substantial risk that a foreign government could obtain their answers. See

[5]As this Court noted in *Valentine*, *supra*, 299 U.S. at 12-13, some extradition treaties, although containing the same provision as the instant treaty with Colombia, also expressly state that the contracting parties "shall have the power to deliver * * * up [their own citizens] if in their discretion it be deemed proper to do so" or that "the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." The treaty with Colombia does not contain such a provision.

[6]Petitioners state that they were "advised by an Assistant Legal Affairs Advisor of the Department of State [George Lehner] that a review of the records of said Department indicates there have been previous extraditions of [United States] citizens to Colombia for criminal prosecution and, further, that a request by Colombia for extradition under existing treaties would be honored by the United States" (Pet. 10-11). We have been advised by Mr. Lehner that petitioners' recollection of their conversation does not agree with his. Mr. Lehner has advised us that extradition of United States citizens has taken place under certain treaties, but, to the best of his recollection, there has been no extradition of a United States citizen to Colombia under the present treaty. Mr. Lehner also stated that, if such an extradition to Colombia were to take place, it would be in violation of the treaty.

In re Parker, 411 F. 2d 1067, 1069-1070 (C.A. 10), vacated and remanded for dismissal as moot *sub nom. Parker* v. *United States*, 397 U.S. 96:

> Rule 6(e), Fed. R. Crim. P., * * * prevents disclosure of matters occurring before the grand jury unless otherwise ordered by a federal court and since for a court to so order under the circumstances presented in the subject case would defeat one of the purposes for grand jury secrecy, i.e. the encouragement of free disclosure by those who have information of crimes, * * * as well as the court's "promise" of immunity, it cannot be assumed that a court would grant such an order or accordingly that there is a danger of incrimination. By virtue of the application of Rule 6(e) any evidence, inculpatory or otherwise, related by [the witness] during the grand jury proceeding would be unavailable to the Canadian government in either an extradition proceeding in the United States or in a criminal proceeding in Canada. [Footnote omitted.]

Other courts also have held that the secrecy of grand jury proceedings eliminates any substantial danger that immunized testimony would be used by a foreign government. *In re Long Visitor*, 523 F. 2d 443, 447 (C.A. 8); *In re Weir*, 495 F. 2d 879, 881 (C.A. 9), certiorari denied, 419 U.S. 1038;[7] *In re Tierney*, 465 F. 2d 806, 811-812 (C.A. 5), certiorari denied, 410 U.S. 914; *United*

[7]Petitioners contend (Pet. 13-16) that there is a conflict among the circuits because *Vandeyacht* v. *United States*, C.A. 9, No. 75-3290, decided November 24, 1975, rejected the position that the secrecy of grand jury proceedings made the possibility of foreign use of the immunized testimony remote or speculative. But the panel in *Vandeyacht* did not purport to overrule *Weir*, which adopted that position. The *Vandeyacht* opinion is unpublished and therefore does not affect the law of the Ninth Circuit. And it is not inconsistent with *Weir*; the panel simply concluded that it could not determine from the record before it whether the witness had a substantial fear of foreign prosecution (slip op. 1), and it remanded for a hearing on the question, among others, of "[w]hat assurances and methods of supporting them can the government or the court, or both, provide that * * * Vandeyacht's answers to the grand jury questions will not be disclosed to Mexican authorities" (slip op. 2). The panel did not indicate that additional assurances of grand jury secrecy would be unacceptable or insufficient; even if it had disagreed with *Weir*, that would establish, at most, an intra-circuit conflict not requiring resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

States v. *Doe*, 361 F. Supp. 226 (E.D. Pa.), affirmed *sub nom. United States* v. *Cahalane*, 485 F. 2d 678 (C.A. 3), certiorari denied, 415 U.S. 989. "The same court which grants immunity is the court which prevents violation of the secrecy" (*In re Tierney, supra*, 465 F. 2d at 811), and there is no reason to believe that petitioners' testimony, given in secret before the grand jury, would ever be made public.[8] Cf. *United States* v. *Yanagita*, 418 F. Supp. 214, 217 (E.D. N.Y.), reversed and remanded on other grounds, 552 F. 2d 940 (C.A. 3).

[8]*In re Cardassi*, 351 F. Supp. 1080 (D. Conn.), supports petitioners' position. But that case has not been followed by any appellate court, and the existence of an aberrant decision by a district court does not indicate a need for review by this Court.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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